

Department of the Army, DoD

§518.17

(n) *Special mail services.* Army Activities are authorized to use registered mail, certified mail, certificates of mailing, and return receipts. However, their use should be limited to instances where it appears advisable to establish proof of dispatch or receipt of FOIA correspondence. The requester shall be notified that they are responsible for the full costs of special services.

(o) *Receipt accounts.* The Treasurer of the United States has established two accounts for FOIA receipts, and all money orders or checks remitting FOIA fees should be made payable to the U.S. Treasurer. These accounts shall be used for depositing all FOIA receipts, except receipts for industrially funded and non-appropriated funded activities. Components are reminded that the below account numbers must be preceded by the appropriate disbursing office two digit prefix. Industrially funded and non-appropriated funded activity FOIA receipts shall be deposited to the applicable fund.

(1) Receipt Account 3210 Sale of Publications and Reproductions, FOIA. This account shall be used when depositing funds received from providing existing publications and forms that meet the Receipt Account Series description found in Federal Account Symbols and Titles. Deliver collections within 30 calendar days to the servicing finance and accounting office.

(2) Receipt Account 3210 Fees and Other Charges for Services, FOIA. This account is used to deposit search fees, fees for duplicating and reviewing (in the case of commercial requesters) records to satisfy requests that could not be filled with existing publications or forms.

§518.17 Appeals.

(a) *General.* If the official designated by the Army Activity to make initial determinations on requests for records declines to provide a record because the official considers it exempt under one or more of the exemptions of the FOIA, that decision may be appealed by the requester, in writing, to a designated appellate authority. The appeal should be accompanied by a copy of the letter denying the initial request. Such appeals should contain the basis for disagreement with the initial

refusal. Appeal procedures also apply to the disapproval of a fee category claim by a requester, disapproval of a request for waiver or reduction of fees, disputes regarding fee estimates, review on an expedited basis a determination not to grant expedited access to agency records, for no record determinations when the requester considers such responses adverse in nature, not providing a response determination to a FOIA request within the statutory time limits, or any determination found to be adverse in nature by the requester. Upon an IDA's receipt of a no records determination appeal, the IDA will direct the records custodian to conduct another records search and certify, in writing, that it has made a good faith effort that reasonably could be expected to produce the information requested. If no records are again found, the original no records certificate will be forwarded to the IDA for inclusion in the appeals packet. When denials have been made under the provisions of the FOIA and the PA, and the denied information is contained in a PA system of records, appeals shall be processed under both the FOIA and the PA. If the denied information is not maintained in a PA system of records, the appeal shall be processed under the FOIA. If a request is merely misaddressed, and the receiving Army Activity or DoD Component simply advises the requester of such and refers the request to the appropriate Army or DoD Component, this shall not be considered a no record determination.

(1) Appeals of adverse determinations from denial of records or "no record" determination, received by Army IDAs must be forwarded through the denying IDA to the Secretary of the Army (ATTN: OGC). On receipt of an appeal, the IDA will—

(i) Send the appeal to the Office of the Secretary of the Army, OGC, together with a copy of the documents that are the subject of the appeal. The cover letter will list all attachments and describe from where the records were obtained, *i.e.*, a PA system of records (including the applicable systems notice, or other. If a file does not include documentation described below, include the tab, and insert a

page marked “not applicable” or “not used.” The order and contents of FOIA file attachments follow: (Tab A or 1) The original FOIA request and envelope (if applicable); (Tab B or 2) The IDA denial letter; (Tab C or 3) Copies of all records entirely released, single-sided; (Tab D or 4) Copies of administrative processing documents, including extension letters and “no records” certificates, in chronological order; (Tab E or 5) Copies of all records partially denied or completely denied, single-sided. For records partially denied, mark in yellow highlighter (or other readable highlighter) those portions withheld; and (Tab F or 6) Legal opinions(s); and

(ii) Assist the OGC as requested during his or her consideration of the appeal.

(2) Appeals of denial of records made by the OGC, AAFES, shall be made to the Secretary of the Army when the Commander, AAFES, is an Army officer. Appeals of denial of records made by the OGC, AAFES, shall be made to the Secretary of the Air Force when the Commander is an Air Force officer.

(b) *Time of receipt.* A FOIA appeal has been received by an Army Activity when it reaches the office of an appellate authority having jurisdiction, the OGC. Misdirected appeals should be referred expeditiously to the OGC.

(c) *Time limits.* The requester shall be advised to file an appeal so that it is postmarked no later than 60 calendar days after the date of the initial denial letter. If no appeal is received, or if the appeal is postmarked after the conclusion of this 60-day period, the case may be considered closed. However, exceptions to the above may be considered on a case-by-case basis. In cases where the requester is provided several incremental determinations for a single request, the time for the appeal shall not begin until the date of the final response. Records that are denied shall be retained for a period of six years to meet the statute of limitations requirement. Final determinations on appeals normally shall be made within 20 working days after receipt. When an Army Activity has a significant number of appeals preventing a response determination within 20 working days, the appeals shall be processed in a mul-

titrack processing system, based at a minimum, on the three processing tracks established for initial requests. All of the provisions of the FOIA apply also to appeals of initial determinations, to include establishing additional processing queues as needed.

(d) *Delay in responding to an appeal.* If additional time is needed due to the unusual circumstances the final decision may be delayed for the number of working days (not to exceed 10), that were not used as additional time for responding to the initial request. If a determination cannot be made and the requester notified within 20 working days, the appellate authority shall acknowledge to the requester, in writing, the date of receipt of the appeal, the circumstances surrounding the delay, and the anticipated date for substantive response. Requesters shall be advised that, if the delay exceeds the statutory extension provision or is for reasons other than the unusual circumstances they may consider their administrative remedies exhausted. They may, however, without prejudicing their right of judicial remedy, await a substantive response. The Army Activity will continue to process the case expeditiously.

(e) *Response to the requester.* When the appellate authority (OGC) makes a final determination to release all or a portion of records withheld by an IDA, a written response and a copy of the records so released should be forwarded promptly to the requester after compliance with any preliminary procedural requirements, such as payment of fees. Final refusal of an appeal must be made in writing by the appellate authority or by a designated representative. The response, at a minimum, shall include the following:

(1) The basis for the refusal shall be explained to the requester in writing, both with regard to the applicable statutory exemption or exemptions invoked under provisions of the FOIA, and with respect to other appeal matters;

(2) When the final refusal is based in whole or in part on a security classification, the explanation shall include a determination that the record meets the cited criteria and rationale of the governing Executive Order, and that

Department of the Army, DoD

§ 518.18

this determination is based on a declassification review, with the explanation of how that review confirmed the continuing validity of the security classification;

(3) The final denial shall include the name and title or position of the official responsible for the denial;

(4) In the case of appeals for total denial of records, the response shall advise the requester that the information being denied does not contain meaningful portions that are reasonably segregable;

(5) When the denial is based upon an exemption 3 statute, the response, in addition to citing the statute relied upon to deny the information, shall state whether a court has upheld the decision to withhold the information under the statute, and shall contain a concise description of the scope of the information withheld; or

(6) The response shall advise the requester of the right to judicial review.

(f) *Consultation.* Final refusal involving issues not previously resolved or that the Army Activity knows to be inconsistent with rulings of other DoD Components ordinarily should not be made before consultation with the Army OGC. Tentative decisions to deny records that raise new or significant legal issues of potential significance to other Agencies of the Government shall be provided to the Army OGC.

§ 518.18 Judicial actions.

(a) This section states current legal and procedural rules for the convenience of the reader. The statements of rules do not create rights or remedies not otherwise available, nor do they bind the DA or DoD to particular judicial interpretations or procedures. A requester may seek an order from a U.S. District Court to compel release of a record after administrative remedies have been exhausted; *i.e.*, when refused a record by the head of a Component or an appellate designee or when the Army Activity has failed to respond within the time limits prescribed by the FOIA and in this part.

(b) The requester may bring suit in the U.S. District Court in the district, in which the requester resides or is the requester's place of business, in the dis-

trict in which the record is located, or in the District of Columbia.

(c) The burden of proof is on the Army Activity to justify its refusal to provide a record. The court shall evaluate the case *de novo* (anew) and may elect to examine any requested record *in camera* (in private) to determine whether the denial was justified.

(d) When an Army Activity has failed to make a determination within the statutory time limits but can demonstrate due diligence in exceptional circumstances, to include negotiating with the requester to modify the scope of their request, the court may retain jurisdiction and allow the Activity additional time to complete its review of the records.

(1) If the court determines that the requester's complaint is substantially correct, it may require the U. S. to pay reasonable attorney fees and other litigation costs.

(2) When the court orders the release of denied records, it may also issue a written finding that the circumstances surrounding the withholding raise questions whether Army Activity personnel acted arbitrarily and capriciously. In these cases, the special counsel of the Merit Systems Protection Board shall conduct an investigation to determine whether or not disciplinary action is warranted. The Army Activity is obligated to take the action recommended by the special counsel.

(3) The court may punish the responsible official for contempt when an Army Activity fails to comply with the court order to produce records that it determines have been withheld improperly.

(e) *Non-U. S. Government source information.* A requester may bring suit in an U.S. District Court to compel the release of records obtained from a non-government source or records based on information obtained from a non-government source. Such source shall be notified promptly of the court action. When the source advises that it is seeking court action to prevent release, the Army Activity shall defer answering or otherwise pleading to the complainant as long as permitted by the Court or until a decision is rendered in the court